Supreme Court, U.S.
AUG 15 1990

No. 90-137

In The

Supreme Court of the United States

October Term, 1990

TRANS PACIFIC BANCORP,
TRANS PACIFIC NATIONAL BANK, et al.,

Petitioners,

vs.

RICHARD F. SCHEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT N. KATZ
Counsel of Record
LAW OFFICES OF ROBERT N. KATZ
2150 Shattuck Ave.
Berkeley, CA 94704
Telephone: 415-548-7900

Attorney for Respondent
Richard F. Schey

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. STATEMENT OF THE CASE

Plaintiff, and Respondent, Richard Schey, a former vice president, senior loan officer and director of Trans Pacific National Bank commenced the instant action in the Superior Court of the City and County of San Francisco against defendants Trans Pacific Bancorp, Trans Pacific National Bank, et al. alleging inter alia, wrongful termination, retaliatory discharge in violation of public policy and wrongful removal from the Board of Directors of the Bank.

The trial court sustained defendants' demurrers based upon a theory that the National Bank Act, in allowing bank boards of directors to terminate bank officers "at pleasure" preempted all wrongful discharge claims by Bank officers.

The California District Court of Appeal reversed the dismissal of plaintiff's causes of action for wrongful termination arising out of retaliatory termination and for wrongful removal from the board of directors of the Bank. The defendants sought review by the California Supreme Court which denied the Bank's petition for review. The California Supreme Court did, however, order that the decision below not be published in the official reports. The decision below thus has no value as precedent.

II. STATEMENT OF FACTS

In February 1985 Schey was hired by the Bank as vice president and senior loan officer. He was elected director

in June 1985 and was promoted to senior vice president in January 1986. While employed by the Bank and serving as one of its directors, Schey discovered that defendant Eddy Chan, Bank president and chairman of the board of directors, had engaged in practices (including commingling of depositors' and personal funds) which were contrary to regulations of the federal Office of the Comptroller of the Currency (OCC), which regulates national banks, as well as contrary to sound banking practice and the best interests of the Bank. Schey brought these facts to the attention of his fellow directors and, when required by law, disclosed them to an investigator from the OCC.

After Schey revealed his concerns, Chan harassed Schey by giving him a false negative evaluation and decreasing his management authority. In November 1986 Schey sought and received assurance from two other directors that his services were still desired and that his employment was secure. Based on those assurances he refrained from seeking other employment.

In September 1987 the executive committee of the Bank board of directors voted to terminate Schey's employment and remove him as a director.

The Court of Appeal held that although Schey was a national bank officer terminated by the Bank's board of directors, U.S.C.A. Section 24, Fifth, did not preempt his tortious discharge claim.

The California Court of Appeal also left standing Schey's claim for wrongful removal from the board of directors holding that if the allegations of the complaint were true his removal "violated the fundamental public

policies favoring full revelation of misconduct to the federal regulation agencies and was unauthorized by law."

III. REASONS WHY THE PETITION SHOULD BE DENIED

A. The instant case does not create a conflict with extant decisions in Federal Appellate Courts or other State Appellate Courts.

1. The decision below has been ordered depublished and may no longer be cited in any other case as precedent.

California Rule of Court 976(b) provides:

> [Standard for opinions of other courts] No opinion of a Court of Appeal or of an appellate department of the superior court shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law.

The argument that, before the order denying publication of the decision herein involved, the decision was cited as dicta (and not relied upon) in another California Appellate decision is indeed a slim reed upon which to lean in asking the Court to grant a petition for certiorari.

2. The defendant argues that the employment or discharge at will provision of the National Bank Act precludes an action for the tort of wrongful termination in retaliation for disclosure to the Comptroller of the Currency of wrongdoing by the Bank. However, there is no discharge permitted "at will" when the termination is

in retaliation for reporting wrongdoing. While the defendant pointed out that 12 U.S.C. §24 has been amended no fewer than twenty-six (26) times since 1922, defendants, perhaps inadvertently, failed to point out to the Court that in 1989 the Act was amended *specifically excluding* the type of termination herein involved from "at will" provisions of the Act. 12 U.S.C. 1811 was amended by adding:

> SEC. 33. DEPOSITORY INSTITUTION EMPLOYEE PROTECTION REMEDY.
>
> "(a) PROHIBITION AGAINST DISCRIMINATION AGAINST WHISTLEBLOWERS – No federally insured depository institution may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to any Federal banking agency or to the Attorney General regarding a possible violation of any law or regulation by the depository institution or any of its officers, directors, or employees.
>
> "(b) ENFORCEMENT – Any employee or former employee who believes he has been discharged or discriminated against in violation of subsection (a) may file a civil action in the appropriate United States district court before the close of the 2-year period beginning on the date of such discharge or discrimination. The complainant shall also file a copy of the complaint initiating such action with the appropriate Federal banking agency.

Thus the National Bank Act envisions an action in tort for this type of discharge and further provided that the terminated employee could, (*not "may only"*,) bring an action in the Federal Courts. There is thus no conflict

with federal law or case decision on this issue. Defendants' petition does not require analysis of the issue of federal preemption of state causes of action, although it would appear that defendant is arguing that whenever there is a federal statute applicable to an industry all state causes of action concerning that industry are preempted. That such is not the case has been recognized by the State Appellate Court, citing *California Federal S. & L. Association v. Guerra,* (1987) 479 U.S. 272, 281, as well as by the U.S. Court of Appeals, Ninth Circuit in *Skillsky v. Lucky Stores, Inc.,* 893 F.2d 1088 (9th Cir. 1990) (That defendants do not recognize the precedent articulated by this Court in *California Federal S. & L. v. Guerra,* or by the Ninth Circuit in Skillsky is surprising since both cases involved situations in California.)

3. The decision of the court below recognized the integrity of sustaining state public policy which not only is not in conflict with federal policy but also, in this instance, enhances the federal regulatory scheme or purpose.

The entire purpose and gravamen of 12 U.S.C. §24 is to ensure that banks be able to act in compliance with and not in contravention of a policy of protecting bank depositors and the public interest. To grant bank boards of directors a free hand in firing those employees who aid and abet the federal regulatory agency is akin to asking the foxes to guard the chickens.

The retaliatory removal of a member of the board of directors is in conflict with federal regulation. The State Court recognized that a retaliatory removal of a director for revealing misconduct flies in the face of "fundamental

public policies favoring full revelation." The result herein presents no conflict to be resolved by the court.

B. The issue involved herein is so shallow and narrow as to mitigate, derogate or seriously challenge the necessity for addressing the issue by this Court.

1. As discussed in Section A, 1. hereinabove there is not even a decision below that is susceptible of future citation.

2. As discussed in Section A, 2. hereinabove, legislation enacted in August of 1989 lays to rest any likelihood of potential conflicts of decision addressing the narrow issue presented herein.

3. There are incredibly few cases involving a national bank terminating a senior officer or removing a director from the board for reporting misconduct to the Comptroller of the Currency. 28 U.S.C. §1257(2) and Rule B.1. of this Court do not appear to contemplate use of this Court's resources on an issue of such little activity or potential conflict.

CONCLUSION

For all of the foregoing reasons the Petition for Writ of Certiorari should be denied. The California District Court of Appeal rendered an exhaustive and reasoned opinion which was denied review by the California Supreme Court. There is no raging conflict, or indeed any conflict, with other appellate decisions addressing the

narrow issue presented herein. Additionally, it is respectfully submitted that the conduct of the defendants was so improper, shameful, and detrimental to the public interest and to the regulatory purpose as to render further review of the issue of no benefit to our society or legal system.

Respectfully submitted,

ROBERT N. KATZ
Attorney for Respondent
Richard F. Schey

Dated: August 16, 1990